NOVEMBER-DECEMBER 1951

Case *and* Comment

The Lawyers' Magazine—Established 1894

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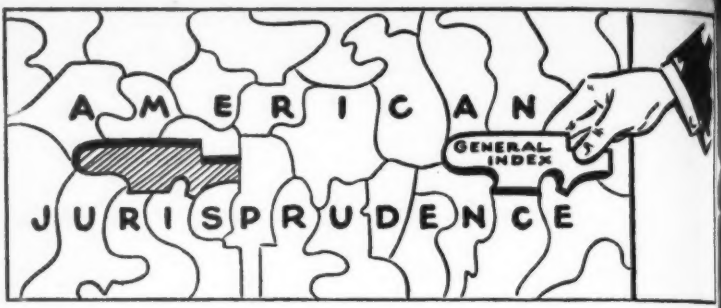
Volume 56 No. 6



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What I Like About Lawyers

By JENKIN LLOYD JONES
Editor, The Tulsa, Oklahoma, Tribune

Condensed from Oklahoma Bar Journal, November 25, 1950

THE other day, driving downtown with my 14-year-old son, we stopped at an intersection and I indicated a gentleman crossing the walkway in front of us.

"That," I said, "is one of our most prominent criminal lawyers."

"Does everybody know it?" the young man asked.

"Certainly."

"Well, if he's a criminal, why don't they put him in jail?"

In this particular case, I thought my youngster had something. But I reflected once again how quick the public is to believe ill of the law profession.

Old Dr. Samuel Johnson perhaps expressed this prejudice best when he once remarked to Boswell, "I hesitate to speak ill of any man, but that fellow is a lawyer!"

Newspapers, I confess regretfully, are partly responsible for this attitude. The law profession, like an iceberg, consists of a large mass out of the public eye and only a small portion that is visible. The great majority of lawyers operate smoothly and quietly below the level of news. Those who appear most often in the newspapers are the showmen, the exhibitionists, and those who flout the ethics of the law. It is unfortunate that quiet, orderly people do not often make good copy. But we cannot change that.

Lawyers do have ideals. There is, to be sure, often a large gap between the stated ideal and the daily practice. That is true, unhappily, in the newspaper business as well.

I recently heard the oath required of persons seeking admittance to the Oklahoma Bar. It is excellent and the people should know about it. But I wonder what percentage of lawyers would be considered sufficiently zealous by their clients if they adhered strictly and literally to its admonitions.

Abraham Lincoln hoisted the target high when, in a lecture to law students in 1850, he said:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has a superior opportunity to be a good man. There will still be business enough."

And Thomas Fuller declared:

"The good lawyer is one that will not plead that cause wherein his

tongue must be confuted by his conscience."

But most people will not confuse lofty promise with actual performance.

Emerson said, succinctly:

"The best lawyer is not the man who has an eye to every side and angle of contingency and qualifies all his qualifications, but who throws himself on your part so heartily that he can get you out of a scrape."

Between the vision of the lawyer as the peacemaker, the searcher for pure justice, the friend of the court—and the concept of the lawyer as the troublemaker, the distorter of facts, the savage champion of his client, however reprehensible the latter may be—there is a wide territory in which truth lies somewhere.

Jokes about lawyers are nearly as old as jokes about women. Not only has their alleged capacity for exaggeration been the subject of gags since Phoenician times, but their reputation for wordiness supplied amusement even in ancient days.

Twenty centuries ago Martial, the epigrammatist, arose in a Roman court and addressed his attorney as follows:

"My suit has nothing to do with assault or battery or poisoning, but is about three goats, which, I complain, have been stolen by my neighbor. This the judge desires to have proved to him. But you, with swelling words and extravagant gestures, dilate on the Battle of Cannae, the Mithridatic War, and the perjuries of the Carthaginians. It is time, my lawyer, to say something about my three goats!"

So much for these canards! Do lawyers have peculiar virtues? Of course, they have. And they go far toward balancing their vices. Indeed, as the years pass I see more and more virtues in lawyers. This is not as extravagant praise as it sounds, since at one time I saw practically none.

In my callow youth I used to lament the fact that we have a government by lawyers. In my college days I was impressed by the omniscience of my professors. They knew everything, and they regarded with lofty pity the confusion of the crowds in the marketplace. I thought that nothing could be finer than a government by professors.

Well, I got out of college in 1933. The government by professors materialized immediately. I never want to see it again.

Then I thought that a government by philosophers and idealists would be desirable. So did Plato. But idealists and philosophers become zealots. And zealots have a way of turning into fiends. Zealots erected the guillotine in Paris. Zealots engineered the murder in the basement at Ekaterinburg. At Dachau I have stood on piles of human ashes that were put there by zealots. I want no more of it.

Government by lawyers is very irritating. Reforms are slow. But outrages and excesses are slow, too. That's worth a lot in this bleeding world.

Lawyers are disciples of order. They are admirers of precedent. They want the rules of yesterday to apply to today, and, if possible, to tomorrow. This exasperates impatient idealists. But no nation has ever grown great while governed by the shifting sentiments of the mob. No nation has survived long under a government by whim.

De Tocqueville, one of the earliest and one of the wisest observers of American government, said almost a century and a half ago:

"The profession of the law is the only aristocratic element which can be amalgamated in America without violence with the natural elements of democracy. I cannot believe that a republic could subsist if the influence of lawyers in public business did not increase in proportion to the power of the people."

I'll settle for that.

Another thing I like about lawyers is their sense of proportion. They know how to divorce issues from personalities. They can control anger, resist hatred, and relegate disagreements into their proper place.

Here, for a moment, the characteristics of the good lawyer and the good newspaperman run parallel. In my profession, if we hated those who disagree with us we would soon hate everyone. Because my life is a constant struggle to resist hating those who oppose me, I admire the ability of the lawyer to handle this great problem.

Case and Comment
THE LAWYERS' MAGAZINE—ESTABLISHED 1894
AQUEDUCT BUILDING, ROCHESTER 14, N. Y.

EDGAR G. KNIGHT, *Editor*
GEORGE H. CHAPMAN, *Business Manager*

Advertising Representatives
NATIONAL PUBLISHERS REPRESENTATIVES, INC.
New York 17, N.Y., 114 East 47th Street,
PLaza 3-5171

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There is a fine line in Shakespeare's "Taming of the Shrew":

"And do as adversaries do in law—strive mightily, but eat and drink as friends."

Is this evidence of cynicism and insincerity? Many people think it is. But tempered cynicism is a stabilizing influence in one's philosophy. He who hesitates to believe the best of one man is unlikely to believe the worst of another. And the ability to roll with the punch is the first law of survival.

Finally, I like the lawyer's sense of equity. That sense is essential, even to those lawyers who seek to destroy equity. If you wish to avoid justice you must still know where it stands.

It is the great tragedy of this world that most sincere honest people have only rudimentary sense of equity. They prefer to feel an issue, rather than think it out. They are governed less

by cerebration than by blood pressure. Too many of them are suckers for catchwords, half-truths, mistaken premises and grotesque conclusions.

These demagogic pitfalls are often dug by lawyers, but lawyers rarely wind up in them. The able lawyer, however rotten his morals and ethics may be, is not a sucker.

The ability to sense the basic right, the elemental truth, is a high and most noble ability. It is unfortunate, of course, that some men gifted with this sense use it to short-circuit justice for the profit of themselves and their clients. But they are like the ignorant savages, who offer up live sacrifice to their God. The act is regrettable, but it is fortunate that the ideal, at least, is recognized.

We sometimes grow impatient with lawyers. We sometimes feel that our friends in the Bar have overdone this matter of cynicism. I, myself, have grown a little ill to hear old lawyers recount with relish what modern-day citizens regard as cheap theatricals of certain former well-known trial lawyers, as of a golden age past, some of whom were making monkeys out of backwoods juries. We think it's high time that some members of the Bar rose above the rough and pliant ethics of the frontier and embraced a higher concept of their duty to our people and the state.

But having said this, I wish to lay a sprig of posies at your door.

You are a force of stability. You are a balance wheel. Unregulated, the great power in the mainspring of human endeavor would unwind itself wildly and rip up the works. You are the escape mechanism that releases this power gradually, in orderly tempo, for the greater good of all.

It is this unique service to humanity that I like best about lawyers.

We sometimes find it hard to live with you.

But what a mess of living we'd make without you.

True or False?

"Embellished with an erudition almost innocuous because almost obsolete, and expressed with a clarity characteristic of the dialectical tergiversations of the medieval theological controversialists, some of the objections to the indictment and the argument in their support involve processes of mental ratiocination not easily within the capacity of persons accustomed to deal with the law in its practical phases only." Batts, Circuit Judge. Whitehead v. United States, 245 Fed. 385.

Contributor: Lillian S. Selcer
New Orleans, Louisiana

Pottsville, U. S. A.

By MARY JEAN ESHBAUGH

SUPREME COURT is in session and the old red brick county court house in Geneseo, New York, hums with activity. Among the busy lawyers and court officials strolls an invisible imaginary figure, a tall, thin Lincoln-like gentleman in a stovepipe hat and frock coat. Readers of Arthur Cheney Train's stories would recognize this figure as Lawyer Ephraim Tutt.

Mr. Tutt walks through the halls of this courthouse for it was Geneseo (population about 2,000) that Arthur Train used as his model for Pottsville, the small town in upper New York state where Mr. Tutt defends the rights of the underdog and wins acquittal for his clients through his knowledge of obscure points of law.

Mr. Train became acquainted with Geneseo in 1914 when as prosecutor on the staff of District Attorney Charles S. Whitman, he was assigned to prosecute Henry Siegel for fraud in the collapse of his mercantile and banking enterprises.

The Siegel failure in New York City involved the life savings of thousands of small depositors in the Siegel private bank, operated in connection with the stores. Public opinion in New York City was so aroused against the defendant that it was believed a fair trial in the city would be impossible. Farmers and villagers of Livingston county were thought to be without prejudice because they had no money in the Siegel bank, so the case was set for trial in the county court house in Geneseo.

In preparation for the trial, Mr. Train spent weeks feeling out the attitudes of the people of the town and observing the ways of life in the small farm trade, college village, situated in northwestern New York State.

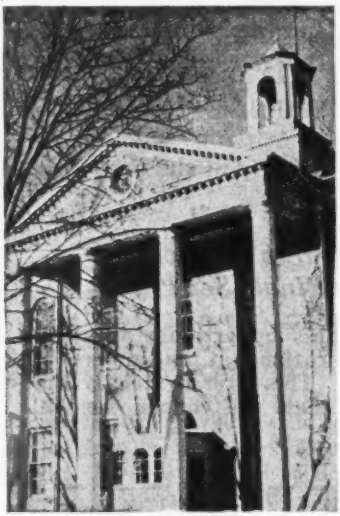
He saw it as the prototype of the typical small town, full of odd and picturesque characters. Here he encountered "aristocratic ne'er-do-wells, tramps, gypsies, hermits, cranky old bachelors, misers and crooked politicians." When he wrote his Mr. Tutt stories, he depicted Geneseo as Pottsville, merely moving the locale to the Mohawk valley. The sleepy streets, the old buildings dating back to the Civil War and earlier, the kindly people, the "deppo," and the circular fountain in the square, he kept the same.

As he describes a trial in Pottsville, "In the sunny chambers of the old Doric courthouse, a crowd gathered to see what was going to happen," so crowds gathered to watch the proceedings of the Siegel trial. Train describes the riots which took place in the Main Street of Geneseo between the two rival "Depositor's Associa-

tions," one which wished to accept the small amount Siegel had raised through his relatives to compound his indebtedness, and the other which feared the effect this would have on the outcome of the trial. These fights usually ended with the losers being ducked in the fountain.

Using this as a model, Train, in his fiction, has Squire Hezekiah Mason, shyster lawyer and feudal baron of Pottsville (Mr. Tutt's chief adversary) frequently ducked in the horse trough in the center of Pottsville's Main Street.

In the stories the characters conduct the town's business while seated on the edge of this horse trough. Everything worthwhile began and was apt to end in the trough.



—photo by Charles Beebe

Livingston county court house, scene of Siegel trial, and setting of Mr. Tutt's legal triumphs.

Although the Geneseo fountain does not claim to be the residence of a portly old frog known as Uncle Joseph, as the Pottsville trough asserts, businessmen still meet at the fountain and chat while crossing the street. Children and dogs are to be seen playing in it many hours of a summer day.

Among the many friends Train made in Geneseo was the county sheriff who later took form in the Mr. Tutt stories as Sheriff Moses Higgins, ex-officio Grand Supreme Exalted Patriarch of the Purple Mountains of Abyssinia and Ruler of the Sacred Camels of King Menelik (men's clubs in Pottsville). Sheriff Higgins was the comrade of Mr. Tutt in many of his legal adventures.

According to Train in his autobiographical "My Day In Court," the sheriff exposed to him some of the practices of country legal procedure. At the end of the Siegel trial, the jury, instead of delivering an immediate verdict as expected, deliberated for hours. Everyone interested had given up and gone home to bed when the sheriff beckoned to Train and led him to an attic room above the jury chambers. Through a crack in the ceiling, they heard members of the jury deliberate as to whether they had stayed long enough to claim another day's pay. This incident Train used in "The Hermit of Turkey Hollow," one of the Tutt stories.

Pottsville boasts a wooden Indian that stands in front of the cigar store, but the only Indians in Geneseo today

are the ghosts of the Senecas who once inhabited the hillside overlooking the green and fertile Genesee valley. The name Geneseo in Indian means beautiful valley. The town was known as Big Tree when the Indians lived there and prosperous were its inhabitants who grew crops on the fertile flats and fished in the meandering river.

But then the white men came and with them the terrors of Sullivan's march through the Seneca homegrounds to avenge the massacre of Wyoming valley settlements. The troops left nothing but burnt homes and crops. The Senecas never rebuilt their villages, but moved on to other lands ahead of the white tide.

White settlers soon came to the valley and the town of Geneseo was officially formed in 1790. James and William Wadsworth and other wealthy families bought most of the surrounding land and an old English air pervaded the countryside with its great houses and tenant farmhouses.

The Genesee Valley Hunt, second oldest hunt club in America, was organized in 1876 and in it have ridden Theodore Roosevelt, princes of the royal house of Sweden, Arthur Brisbane, "Wild Bill" Donovan, and the Wadsworths, Chanlers, and Fitzhughs, squires of the valley. On crisp October and November mornings the huntsmen gather; the Master of the Hounds, the Huntsman, and the Whips are dressed in the traditional hunting garb of red or blue coat, stiff hat, and near-white breeches. The horn sounds "Boots and Saddle" and the riders chase sly reynard for 20 or 30 miles over the rolling hills and through autumn-hued woodlands.

As the town grew with the years, a Normal School for teachers was built. Students livened up the quiet streets with their talk of classes, teachers, and affairs of the heart. In recent times, the school received the new title of State Teacher's College and added an administration building.

When Geneseo became the county seat, the stately brick courthouse with tall white pillars was constructed. The Siegel trial which introduced Arthur Train to the village, was the most important trial ever held there. The town was filled with lawyers and newspapermen and the courthouse was brilliantly lighted every evening as cases were studied and news reports were sent out.

When the trial was over, Train had won his case, Siegel was convicted and sentenced, and the reporters and lawyers returned to New York City. The town settled once more into its peaceful way of life.

The courthouse library was once again a quiet place where Mr. Tutt could spend hours reviewing cases to find legal quirks to rescue the technically guilty but morally innocent from the clutches of unrighteous law.

The Legal Profession in Italy

By ANGELO PIERO SERENI*

Condensed from Harvard Law Review, April, 1950

IN MOST cities and towns of central and southern Italy a lawyer's office consists of two or three rooms set aside in his own home. The family maid opens the door to the client and ushers him into the foyer to wait; often the conference is held in the living room. The lawyer is assisted by merely a secretary and perhaps one or two law clerks. This rather simple arrangement is typical of the many contrasts between the practice of law in Italy and that in the United States. While some of these contrasts are a natural outgrowth of the widely divergent economic structures of the two countries, others have no such foundations and a study of Italian practice suggests profitable lessons for the American Bar.

Two Classes of Lawyers.—As in most civil law countries, lawyers in Italy are divided into two classes: "*avvocati*" and "*procuratori.*" The distinction is important chiefly in civil litigation. The *procuratore* subscribes all pleadings and other papers submitted to the court, is present at the taking of depositions, and must sign the briefs; with few exceptions all papers during litigation are served on him rather than on his client. The *avvocato* in general performs broader and more responsible functions; he advises the client, drafts all papers and briefs (though they need not be signed by him), and argues the case. The distinction is also of some importance in nonlitigation matters, most of which are handled by *avvocati,* although a *procuratore* may perform some of the more ministerial functions, such as search of records, execution of documents, etc.

In practice, however, the distinction between the two classes of lawyers tends to disappear since a single individual may be both an *avvocato* and a *procuratore,* even serving in both capacities in the same matter, and most Italian practitioners find it advisable to qualify for both positions. Moreover, practice as a *procuratore* for a certain number of years entitles one automatically to become an *avvocato.*

All Italian lawyers must be enrolled in the professional rolls, which are

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maintained within the jurisdiction of each Tribunal. *Procuratori* can practice only within the territorial jurisdiction of the Court of Appeals to which appeals are taken from the Tribunal in which they are enrolled, *avvocati*, on the other hand, may practice everywhere in the Republic. The *procuratori* are subject to another limitation in that each year a governmental decree fixes the maximum number that may be enrolled according to the needs of the particular jurisdiction; there is no numerical limitation on *avvocati*.

Admission to the Bar.—The basic requirements for admission to the bar are Italian citizenship (as a rule), full legal capacity, character and conduct beyond reproach, and a law degree obtained from or confirmed by an Italian university.

Because their activities are thought to conflict with a lawyer's duties, many persons are disqualified from private practice of law—e.g. notaries, clergymen, merchants, executives of corporations, newspapermen, judges and court officers, prosecuting attorneys, and all civil servants except university and high school teachers.

Candidates for admission to the bar must pass an examination consisting of a written and an oral part, and differing for enrollment as *avvocati* and as *procuratori*. Most unfortunately, it has become quite a frequent practice during the last fifteen years to reduce the period of apprenticeship or to waive it altogether, and even to waive the examination requirement for certain classes of applicants—first Fascists, then veterans, and more recently those who could not clerk or take the examination because of Italy's troubled conditions.

Attorney-Court Relationship.—Lawyers must take an oath of office that they shall practice with fairness, honor, and diligence. They are auxiliaries of justice whose function is to co-operate in the proper and efficient administration of justice. Article 359 of the Penal Code provides that lawyers perform "services of public necessity"; consequently, with respect to certain crimes, the fact that they are committed by or against a lawyer may constitute an aggravating circumstance.

Relations between judges and lawyers are on a more formal basis than in this country; there is in fact a sharp separation between the two. It is quite unusual for a judge to resign and become a lawyer or for a lawyer to be called to the bench. Judges are never elected and their tenure is protected, so they do not need to court the political favor of lawyers. Theirs is a lifelong career, which usually starts almost immediately after graduation from law school and ends upon retirement, usually at seventy. Now judges are chosen from law graduates by competitive examinations and go through a period of apprenticeship either in a court or with the Department of Justice. Appointments to positions on higher courts are open only to judges of lower courts and are made on the

basis of seniority coupled with competitive examinations.

Attorney-Client Relationship.—The relationship between lawyer and client is basically contractual in nature, coupled with certain necessary agency powers. There are several distinctive features, however. In litigation, for example, a lawyer has no power to settle on behalf of his client unless expressly authorized. Either lawyer or client may terminate the relationship at will. If the client terminates the contract he must pay for work actually done on a quantum meruit basis and cannot recover fees advanced unless the termination was justified; the lawyer, on the other hand, has a duty not to act maliciously or in bad faith in terminating the relationship. A lawyer may be held liable only for gross negligence, not for an error in judgment, and not for remote or conjectural damages. Since the services of a *procuratore* are as a rule necessary, he can refuse to be retained by a client only for a good cause. An *avvocato*, on the other hand, may refuse to act as counsel without giving any reason. Lawyers are considered fiduciaries toward their clients and a breach of trust constitutes a crime.

Lawyers may, but seldom do, handle their clients' funds, and property is rarely left with them in escrow. A lawyer is not permitted to take undue advantage of his legal ability; for example, he may not as a rule become the assignee of a litigated claim. Communications with lawyers are privileged to a much greater extent than in the United States, and papers entrusted to a lawyer may not generally be subpoenaed. Also it is very unusual for a lawyer to testify on behalf of his client with regard to matters in which he acted in a professional capacity.

On the theory that the lawyer's relation to his client should be one of individual and personal trust, the practice of law in partnerships is not permitted in Italy. Although recent legislation authorized certain loose forms of professional association, they are a far cry from American law partnerships for there is no joint liability of the associates to the client; there is

little more, in fact, than the sharing of the same premises and secretarial staff. A client may retain one *procuratore* and as many *avvocati* as he wishes, but the professional relationship exists between each of them separately and the client, and each is individually liable to the client. Usually a busy lawyer has one or more "substitutes" to assist him and to whom he delegates duties under authorization of the client; however, the fee is paid to the one who was retained, and he alone is directly responsible to the client.

Italy has witnessed during the last few years the well-known phenomenon of the concentration of the better and larger part of the legal practice in the hands of a few lawyers; yet, most Italian practitioners, even the busiest, practice alone or with one or two assistants. Without being disrespectful or critical, it may be said that Italian lawyers are still organized like artisans rather than like entrepreneurs. This is still possible because the economic, business, and financial structure of the country is much less complicated and diversified than that of the United States. Furthermore, the Italian legal system is much simpler; there is much less law, and legal matters do not involve the same amount of research as in this country. Finally, Italians dislike the impersonal atmosphere of large law offices; they prefer the combination of office and residence mentioned previously. This arrangement, which had its beginning in the old civil law concept that a lawyer should be on duty twenty-four hours a day, is still possible because there is no sharp separation in Italian cities between residential and business sections; it is convenient because it saves the lawyer a considerable amount of time and reduces his overhead. In fact, because of this arrangement and the meager salaries paid most assistants and clerical help, overhead rarely exceeds fifteen to twenty per cent of the lawyer's receipts.

Expenses and Fees.—It is a basic and rather sensible principle of Italian procedural law that all expenses incurred by the successful party to litigation should generally be borne by the defeated party. Costs include lawyer's fees as well as court costs, which are high because of burdensome stamp and registry taxes and filing fees. Under certain circumstances, the prevailing party may be denied reimbursement for any of his expenses or for excessive or unjustified expenses, but in no event can the expenses of the defeated party be charged to the successful one.

Lawyers' fees, both in litigation and in other matters, are controlled by statutory schedules and are subject to court supervision. The services rendered by a *procuratore,* such as entering an appearance, putting a case on the calendar, and the like, can be clearly and precisely determined and evaluated; hence, the schedule sets forth the various items for which a *procuratore* is entitled to compensation and the fee for each of them, depending on

the nature of the services, the jurisdiction in which they are rendered, and the value of the matter involved. These fees cannot be changed by agreement between the parties. Services rendered by an *avvocato,* on the other hand, usually cannot be clearly identified and isolated, so the schedule merely classifies generally the various services, the criteria for determining the fee, and the maximum and minimum to which the *avvocato* is entitled. Agreements providing for a fee lower than the minimum are not permissible, but parties may agree that the fees of the *avvocato* be higher than those provided in the schedules. In fixing the actual amount of the fee due by the defeated party the court must consider the nature of the litigation, the amount involved, the number and importance of the issues, the type of court, and the personal activities performed by the lawyer. In fixing the amount due by a party to his own *avvocato* the court will consider in addition to the above criteria the result achieved and the quality of the work done, and it may set a fee higher than that to which the prevailing party is found to be entitled against the defeated one. Generally, fees in litigated matters are much smaller than in the United States, while fees for matters outside of court, such as drafting contracts, organizing corporations, and handling real estate transactions, are much higher.

Because of the schedules, fees are seldom agreed upon beforehand; thus the complicated and somewhat undignified bargaining prevalent in some countries is avoided. Lawyers may not represent clients in litigation on a contingent fee basis, and while such fees are sometimes accepted in nonlitigation matters, they are looked upon with disfavor. Suits to recover legal fees are disapproved by the Italian legal profession. In case of dispute over the amount of the fee, either the attorney or the client may request the *Ordine degli Avvocati e Procuratori* (a professional body discussed at length below) to attempt a settlement. If a settlement is not reached, judicial action is the only remedy. Before submitting his fee to the court, the lawyer may ask the *Ordine* for an opinion on its fairness, and on the basis of his bill coupled with this opinion he may move for summary judgment. The opinion of the *Ordine,* though not binding on the court, is highly persuasive.

Professional Organization.—All lawyers residing within the jurisdiction of each Tribunal are members of the local *Ordine degli Avvocati e Procuratori.* The *Ordine* has a different nature, greater authority, and broader functions than a state bar association in the United States. The *Ordine* are statutorily created and perform quasi-judicial and other functions; membership is compulsory. Aside from passing on contested bills for professional services, each *Ordine* has custody and supervision of the rolls of lawyers for the jurisdiction in which it operates, decides on applications for admission

and is authorized to strike a member from the rolls; and has disciplinary powers over lawyers practicing within the jurisdiction. It may punish instances of nonprofessional misconduct which may reflect on the dignity of the legal profession; its sanctions are warnings, censure, suspension from practice for two to twelve months, and disbarment. Conviction for certain crimes automatically involves disbarment, and a lawyer though not guilty of professional misconduct may be stricken from the rolls on various grounds such as nonpayment of general taxes. Disbarred lawyers may be reinstated under certain circumstances.

There necessarily are safeguards for the rights of the individual lawyer: the procedure in all matters within the jurisdiction of the *Ordine* is regulated by statute and proceedings are supervised by the Attorney General's office. Appeals from orders denying enrollment, or striking a lawyer from the rolls, or inflicting disciplinary measures are brought before the National Lawyers' Council, which sits in Rome and consists of twenty lawyers appointed by local *Ordini*. Appeals from the decisions of the Council may be taken to the Court of Cassation only on an error of law.

Conclusion.—The organization of the Italian legal profession is typical of a country where a highly developed economy does not yet prevail, where lawyers generally belong to the middle and upper middle class, and where the separation between lawyers and businessmen is much sharper, at least in principle, than in the United States. Certain useful suggestions, however, may be derived from a study of the Italian organization, especially with regard to the *gratuito patrocino* and the determination of fees. On the other hand, there are serious defects in the Italian bar. One of the most serious at present is that there have been admitted in recent years too many applicants who lack either the legal training or the moral qualities and financial strength which are basic requirements for a successful practice. Some other basic changes are necessary. Law schools, for example, must develop from dignified finishing schools into true professional schools. The number of law graduates must be reduced by ruthlessly eliminating unworthy students during their first law school years. Law clerkships must be better organized. Finally, the fee schedules must be amended to conform to the increase in the cost of living.

Radical changes were officially proposed in 1944, but not much has been done. In view of the traditionalistic point of view of the legal profession in Italy, as in most countries it may safely be assumed that, barring a social upheaval, no radical changes will occur.

AMERICAN BAR ASSOCIATION SECTION

The publishers of Case and Comment donate this space to the American Bar Association to permit it to bring to our readers matters which the Association deems to be of interest and practical help to the general practitioner.

AS THE 74th annual meeting of the American Bar Association passed into history in New York City last September, it was generally agreed that never before had so many lawyers accomplished so much in such little time—and had so much fun doing it.

It was a three-ring circus from the moment John W. Davis presented the address of welcome until the tired delegates and visitors jammed the airports and railway stations for the "long voyage home." The only complaint was that there was *too* much to see and do in a brief five days.

Amid the procession of outstanding addresses, significant legal conferences, convention business and fun and frivolity, two events are worthy of extra-special mention—two events honoring two leaders of the American Bar. Howard L. Barkdull, of Cleveland, Ohio, president of the National Conference of Commissioners on Uniform State Laws, was elected president of the ABA for 1951–52, succeeding Cody Fowler, of Tampa, Florida. And Reginald Heber Smith, of Boston, Massachusetts, Director of the Survey of the Legal Profession, was presented with the Association's highest award—the Gold Medal for "conspicuous services to American Jurisprudence."

The list of speakers who addressed the General Assembly and the various meetings reads like a selected excerpt from "Who's Who." Senator Estes Kefauver, Governor Earl Warren and former Secretary of War Robert P. Patterson joined forces to discuss the state and national aspects of "The Menace of Organized Crime" and the problem from the viewpoint of the ABA. Defense chiefs Charles E. Wilson and Eric Johnston spoke on "Mobilization and Its Need" and "Stabilization and Freedom." Governor Thomas E. Dewey presented his criticism of what he termed "the Korean blunder." And lawyer-novelist Erle Stanley Gardner analyzed "The Writing Problems of an Attorney as seen by an Author."

The conflict between freedom of the press and the effect of such freedom on the right to a fair trial was debated by former U.S. District Judge Simon H. Rifkind, Kefauver counsel Rudolph Halley, journalist Marquis W. Childs and N.Y. Times radio editor Jack Gould. "The Lawyers' Responsibility to America" was discussed in the annual address presented by President Fowler. And the Right Honorable Viscount Jowitt, The Lord High Chancellor of Great Britain, Roger Greene, President

of the Incorporated Law Society of Ireland, and John Foster, K.C., M.P. were among the leading guest speakers.

But these addresses formed only a small part of the ABA's 74th annual convention. The Committees on Legal Aid Work and Lawyers' Reference Service were studying measures to counter the menace of socialized law. A resolution was adopted by the House of Delegates to continue the life of the Committee to Study Communist Tactics, Strategy and Objectives. The section on Corporation, Banking and Business Law cautiously approved the new Uniform Commercial Code, at the same time recommending that it be subject to continued scrutiny and improvement before its submission to the state legislatures. The Committee on Insurance Practice and Procedure conducted an instructive panel on "Trial Practices." And conferences were held on such divergent topics as "The Role of Private Covenants in Urban Redevelopment" and "International Uniformity in Food, Drug and Cosmetic Law Between the United Kingdom, Canada and the United States."

Among the other highlights of the Convention was the presentation of the now famous "Truman Letter" at the Criminal Law session on "The Protection of Individual Rights and Government Security in Times of Stress." Warning that the repressive security measures of police states do not promote their over-all national security, the President called upon the bar to utilize its "peculiarly strategic position to provide leadership in solving the problem of reconciling our security measures with the essentials of our heritage of freedom." Also noteworthy was the action of the Section on International and Comparative Law supporting the proposals of Harold E. Stassen, president of the University of Pennsylvania, that the proposed Genocide Treaty should carry reservations correcting its definitions and providing that it is not self-executing and that the crime of genocide should be legislated against by Congress. And the three judge advocates general of the Armed Forces discussed the utilization of lawyers by the military, as Judge Paul W. Brosman of the U. S. Court of Military Appeals praised and the ABA Committee on Military Justice criticized the new Uniform Code.

Add to all of this the annual dinner, the President's Reception, dancing in the grand ballroom of the Waldorf-Astoria, a succession of law school luncheons, innumerable cocktail parties given by the local bar associations, a sightseeing tour of New York Harbor, a gala fashion show, and an assortment of complimentary tickets and passes and you have the story of the ABA's 74th annual conclave.

The ABA has seen a successful year under the leadership of President Fowler; the delegates and members have enjoyed a good meeting and all are looking forward to another year of legal progress and the San Francisco Convention of 1952.

Law Office Time Records

By JACOB V. SCHAETZEL
of the Denver, Colorado Bar

Reprinted from Dicta, January, 1951

WE HAVE found in our office that a large part of our practice consists of telephone messages, both from the client and to the client. This is caused by the fact that the client is busy and so are we. We try to do all business that it is possible to do on the phone. We readily recognize that there are many cases and situations where a personal interview, either in the other lawyer's office or in our office, is better than telephoning. Nevertheless we have found that on many days, more than a third of our entire time for the day has been taken up with telephone consultations of one kind or another.

For many years we made no record of these calls. While we tried to think of all the work done when setting the fee, we came to realize that it would not be fair either to the client or to ourselves unless we knew fairly well the number of telephone calls and personal interviews, together with general office work such as typing, dictating and so forth, that we had actually done in a case.

In order to give us a better basis on which to arrive at a fair fee, we started keeping records on plain 3x5 sheets of scratch paper. Now as the telephone calls come in, or we are interviewing clients or other attorneys, or talking over matters in the office, we jot down the date, name of client, and a short record of what took place, such as, "wrote letter concerning title." We then jot down the number of minutes it took. In order to do this expeditiously we divide the hour into ten-minute periods and number them from one to six. If the matter runs over an hour, we just keep adding figures such as 15/6, i.e. two and one-half hours.

About once or twice each week we file these in alphabetical order in a separate file, not in the clients' files. From time to time, we ask our secretaries to go through these "time cards," as we call them, and bunch them together so that they are more easily handled. Once each month we go through them, and if we think there has been sufficient time recorded, we make a charge to apply on account only. Bills are sent each month to those clients for all money expended and work performed. There are some exceptions, such as in estate work.

In such cases, the client is billed at the end of the period, provided it is not too far away. These time cards are then attached to the fee slip, and filed away.

We find it pays to do this because the clients are not billed all at once for fees which at times appear quite substantial. It also permits us to pay our income taxes on the basis of the fees earned during the period covered.

We have tried this now for the past seven or eight years and have found that, without exception, the clients who are largely business people appreciate this method of handling their business. In arriving at the fee we further take into consideration the work performed, the ability of the client to pay, and whether we were able to save the client money or make some for him.

Medal of Honor

Major General William F. Dean, of Berkeley, California—Medal of Honor. In the hard early days of the Korean War, when it was Red armor against American rifles, General Dean chose to fight in the most seriously threatened parts of the line with his men. At Taejon, just before his position was overrun, he was last seen hurling hand grenades defiantly at tanks.

General William Dean knew in his heart that it's every man's duty to defend America. You know it, too. The General's job was in Korea and he did it superbly well. Your defense job is here at home. And one of the best ways to do that job is to start right now buying your full share of United States Defense* Bonds. For remember, your Defense Bonds help keep America *strong*. And only through America's strength can your nation... and your family... and you... have a life of security.

Defense is your job, too. For the sake of all our servicemen, for your own sake, help make this land so powerful that no American again may have to die in war. Buy United States Defense* Bonds now—for *peace!*

Remember when you're buying bonds for defense, you're also building personal cash savings. So join the Payroll Savings Plan where you work, or the Bond-A-Month Plan where you bank. For your country's security, and your own, buy U. S. Defense Bonds!

U.S. Savings Bonds are Defense Bonds - Buy them regularly!

Bureaucracy and Red Tape

By EWELL D. MOORE
of the Los Angeles Bar

Condensed from the Los Angeles Bar Bulletin, February, 1950

"RED TAPE" as we use the term today, is given a meaning quite different from its ancient origin, that is, colored ribbon for tying up documents of an extremely formal nature. We now use it to imply abusive reproach for scrupulous adherence to prescribed routine, especially when the result is delay or inaction by government bureaus. "Bureaucrat," in its correct meaning, is an official who governs by rigid and arbitrary routine, who, in turn, is controlled by rules and regulations laid down by policy-making superiors.

The frustrated public, being ignorant of these rules, complains when their application pinches. Consequently, all employees of government, whether national, state, or otherwise, become "bureaucrats" in the mind of the confused public. Everybody knows about "red tape," but they do not know how this fictional and colorful entanglement is spun. There is a tropical vine said to have sinister power to grip anything that touches it, and if not promptly loosed will throttle the victim. Government red tape is something like that.

Government "red tape" gives rise to absurd and even humorous complications as well as complete frustration. Often the ensnared victim does not survive the unwinding process. Then it is up to his heirs to prove they were really born, are living and entitled to take up the burden of the departed ancestor, and go on from there.

Given a legislative act, federal or state, creating a new department or agency, with authority to make its rules and regulations, and the red tape spinners will do the rest. What they can draw out of an apparently simple statute is amazing to the ordinary layman. Soon there is a "manual" of printed rules, which grows and grows until there is a mesh of red tape fine enough to entangle the unwary, and confuse even the lawyer he is obliged to hire to take him by the hand.

Government red tape is not new. But with the vast expansion of industry and its regulation; the increase of "government in business;" the tendency of state and city to carry their troubles and hat in hand to Washington for money and more money; the dependency of the individual upon government to keep him in a job, provide financial security in old age and

a shade tree to lie under, it has multiplied in recent years beyond measure.

Now, all this would appear to portend an eventual crackup. But we have a happy faculty, or have had up to now, of working our way out of bad messes. Especially when we bring our sense of humor to bear on a given problem. Even the red tape snare is not without incidents of rare humor as well as absurdity. Like the case of the Georgia mules.

The "Georgia Mule Case" is fictitious and of doubtful validity. However, it is the excuse for poking fun at the red tape boys in government service. Maybe it will induce a wry smile from some of them.

It seems there once was a local lawyer who was engaged by a government agency to defend a suit brought by an architect for a long overdue fee, and which red tape had successfully tied up in Washington. In due time the lawyer sent in his meticulously prepared voucher for services rendered. For more than a year he shuffled his daily mail, hoping to find the familiar slender brown envelope with green shaded window, indicating that a government check was within.

Lawyers hesitate to write about overdue fees, especially when the client is rich and important. But he concluded that a year was long enough to wait and so he studiously composed a dunning letter to his government. Not the kind a merchant might send to a debtor, curtly requesting a check by return mail, but one that approached the subject indirectly. He identified himself as a lawyer who had, a long time ago, rendered certain legal services, for which he had, in due time, forwarded his bill. But, he said, the agency probably was too busy with important matters, or it may have fallen among those annoying letters that, in most offices, daily find their way to the bottom of the pile of things to be done. He hoped it would not meet the fate of the Georgia mule claim, though it was unlikely that any newcomer to Washington would remember it. However, since his case had the same element of financial suspense as the mule claim, it might be well to advert to it briefly.

At the beginning of the Civil War, he said, there was a kind hearted Georgia plantation owner who freed a favorite old colored man and his family, and gave them five acres of land and a span of young upstanding mules. The old man and his numerous progeny were doing right well on hog jowl and hominy when along came Sherman's army in its march to the sea. They made no distinction as to ownership of property, and swept away the black man's mules with the white man's chattels. Long after the war was over a white friend filed a claim for the old man with the government for the confiscated mules. Everybody said: "Why, yes sure! Damn shame. You cain't do that to a free, peaceful citizen of this great republic. That claim will be paid quick."

Well, the old man lived out his span

of life in hope and waiting. He passed the claim on to his oldest son, confident that justice would be done. "Son," he said, "you'll get the Gov'ment money right soon. They just been too busy to pester with my li'l ol' claim. But it'll be along soon and will nigh make you rich, what with intrust, and all." The son waited, and hoped. In time he, too, handed down the claim to his heirs, confident that the Gov'ment always pays its debts. Came the third generation; a free-wheeling, snake-hipped, jazz age. Grandpa's old mule claim was too far in the past for them to worry about.

One day someone in the catacombs of bureaucracy, in order to make way for a new agency of government, waded through a mass of tape-smothered documents and came upon the claim of the old colored man where it mouldered for many decades. The claim had been allowed in 1875! Investigations were ordered; letters and memos, directives and reports prepared; summaries and analyses, opinions and all the other strange communications of bureaucracy circulated. Field agents were hurried south to interview the heirs, if any were living, and ascertain the facts and incidents concerning the old man and the mules. Yes, they found several third-generation descendants who ordinarily would have qualified to pull down old grandpap's mule money, with interest. But the government, as often happens, had laid down the rule that inasmuch as the mules were not available for identification, the heir claimants must at least furnish the names of the two animals. One heir of the fourth generation, quick at improvising, said he heard his grandmammy speak of one of the mules as "Ben," but no one could name the other member of the now celebrated team that disappeared with the dust of Sherman's army.

The case file in Washington grew to monumental size. No one would take the responsibility of modifying the rule laid down by the top tape-makers that both mules must be named before the claim could be paid. No, sir! Congress might demand the file any time, and somebody called before a committee to explain why only one mule was named, when everybody knows a team is two mules. And so the mule case was closed. But what to do with the money that had been appropriated to pay for the mules, way back in 1875? There were long and deep deliberations of heads of departments, legal counsel and searchers of precedents. Finally, a directive was composed, edited and issued. It ordered the money "covered" into the treasury, from which there is no recall. Once there it becomes as lifeless as grandpap and his mules; as final as the Supreme Court's refusal to review.

The lawyer closed his appeal to have his bill rescued from the strangling tentacles of red tape, given air and fanned back to life and activity. By airmail he received a slim brown envelope with green window. The fictional mule story had cut the red tape.

Soliloquy of the Law

By JOHN H. CALDWELL, *Librarian*

Arkansas Supreme Court Library

"A CODE, or not a code,—that is the question!
Whether 'tis better in the courts of law to suffer
The flaws, defects, injustices and technicalities,
Or to take up arms against them,
And by revising end them! To trim, to amend,
No more—and by a Code to say we end
Abuses, and the thousand glaring nauseating inconsistencies
That law to-day is heir to; 'tis a consummation
Devoutly to be wished.—To prune, to change,
To amend, perhaps DESTROY! Ay, there's the rub;
For in that deep sleep of law what ills may come,
When we have shuffled off this dreadful plague
Must give us pause. There's the respect or bondage
That makes precedents of long life;
For who would bear the whips and punishments of law,
The judge's frown, the lawyer's charges,
The pangs of satisfying debts, the law's delay,
The insolence and persistence of sheriffs, and the spurns
That patient merit of the policeman takes,
When he himself might his quietus make
With a *bare reform?* Who would judges pay
To groan and sweat under a weary life,
But that the dread of something after change
(Those undiscovered evils from whose ruin
No government returns) puzzles the will,
And makes us bear those ills we have,
Rather than fly to others we know not of.
Thus *wisdom* does make cowards of us all,
And thus native hue of resolution
Is sicklied o'er with the pale cast of thought,
And enterprises of great pith and moment
With this regard their currents turn awry,
And lose the name of law
Confidence, and respect!"

Among the New Decisions

Anti-Hitchhiking Laws — *construction and effect.* In Bateman v. Ursich, — Wash2d —, 220 P2d 314, 18 ALR2d 1440, consolidated actions by two plaintiffs against the same defendants, one to recover for personal injuries and the other to recover for death, both arising out of the same automobile accident, it appeared that an applicable anti-hitchhiking statute prohibited persons on the public highways from soliciting transportation, and also prohibited vehicle operators from offering or giving transportation upon such solicitation. An otherwise applicable guest statute prohibited non-paying guests in motor vehicles from recovering for personal injuries or death unless the "accident" involved was "intentional" on the part of the owner or operator of the vehicle. The injured plaintiff and the intestate of the other plaintiff solicited a ride from defendant, who responded to such solicitation, and very shortly after the hitchhikers were picked up an accident occurred in which one of them was injured and the other killed.

A majority of the Washington Supreme Court took the view that any violation of the anti-hitchhiking statute by the defendant did not prevent his reliance upon the guest statute as a bar to the present suits, and since no allegations that the accident in question had been intentional were made the action of the trial judge in sustaining demurrers to the complaints and dismissing the suits, was proper. The opinion was written by Justice Donworth.

The appended annotation in 18 ALR 2d 1447 discusses "Anti-hitchhiking laws: their construction and effect in action for injury to hitchhiker."

Automobile Liability Insurance — *exclusion of "commercial" use.* Lintern v. Zentz, 327 Mich 595, 42 NW2d 753, 18 ALR2d 713, involved an employee who, while making a pleasure trip on his day off, undertook to transport two of his employer's trailers to their station by attaching one to his automobile and loading the second trailer onto the first one. In this undertaking he acted of his own volition without authorization by his employer, neither expecting nor receiving any compensation therefor

An accident occurred, resulting in a suit in which the plaintiff obtained a judgment against the employee and his employer. In garnishment proceedings the employee's liability insurer denied liability, relying upon clauses in the policy which exempted from coverage "commercial use" of the automobile and the towing of trailers to transport goods or materials "in any business enterprise." In an opinion by Justice North, the Supreme Court of Michigan held the insurer liable, finding that at the time of the accident the automobile was not in "commercial use" and the employee not engaged in a "business enterprise" within the meaning of those terms as used in the policy.

The subject of the appended annotation in 18 ALR2d 719 is "Construction of clause of automobile liability policy excluding coverage in case of 'commercial' use."

Contract to Share Profits — *definiteness.* The action by an employee against his employer in Petersen v. Pilgrim Village, 256 Wis 621, 42 NW 2d 273, 18 ALR2d 206, was based on repeated promises of the employer to pay the employee "a share of the profits" in addition to his regularly stated salary, without any agreement as to the percentage of the profits to be paid.

A judgment for the plaintiff was reversed by the Supreme Court of Wisconsin, in an opinion by Chief Justice Fritz, which held that the promises were too indefinite to establish a valid and enforceable contractual obligation. The absence of any evidence whatever of a promise to pay plaintiff the reasonable value of additional services was adjudged to render improper an amendment of the complaint and an instruction in relation thereto, but because of the failure to try the real controversy as to the plaintiff's right to payment for the additional services and, if so, the reasonable value thereof, the cause was remitted for a new trial.

The subject of the appended annotation in 18 ALR2d 211 is "Requisites as to definiteness of agreement to pay employee share of profits."

Dibability Insurance — *age limit, proofs.* The holder of the disability policy involved in Mosby v. Mutual Life Insurance Co. of New York, 405 Ill 599, 92 NE2d 103, 18 ALR2d 1054, became totally and permanently disabled before reaching the age of sixty years, but did not submit proof thereof to the insurer until after he had reached that age. The insurer denied liability in reliance upon a clause which required the insured to furnish proof of disability before attaining the age of sixty. The caption of this clause, in large and heavy print, indicated "Benefits in the Event of Total and Permanent Disability before Age 60."

In an opinion by Justice Daily, the Supreme Court of Illinois held that the insurer was liable for disability occurring before the specified age, even though proof was made thereafter.

"Requirement of disability policy as to proof of disability before reaching specified age as barring recovery where

disability occurs before, but proof is made after, attainment of such age" is the subject of the appended annotation in 18 ALR2d 1061.

Executors and Administrators — *adverse interest as disqualification.* In Howd v. Clay, 312 Ky 508, 228 SW2d 437, 18 ALR2d 629, the widow of a decedent, who had not lived with him for twelve years prior to his death, executed a release of her interest in his estate in consideration of past services of his sisters, with whom he had resided, and of a cash payment. The widow thereafter instituted action (later dismissed without prejudice) to set aside the release for fraud and lack of consideration and to recover her full interest in the decedent's estate. On the widow's application for appointment as administratrix, she testified that if appointed she would pay herself her full dower interest. It was held by the Kentucky Court of Appeals that the widow's adverse or antagonistic interest justified the county court in refusing to appoint her and in appointing the public administrator (the decedent's sisters having declined to qualify). A statute providing for the removal of a personal representative who became "incapable to discharge the trust" was referred to by the court, and the same ground was held to authorize denial of the right to qualify in the first instance. Justice Helm wrote the opinion.

The subject discussed in the appended annotation in 18 ALR2d 633 is "Adverse interest or position as disqualification for appointment as personal representative."

Executors and Administrators — *delay in payment of legacy.* American Jewish Joint Distribution Committee v. Eisenberg, — Md —, 70 A2d 44, 18 ALR2d 1380, a suit brought by an executor against legatees for directions of the court as to administration of the estate, involved the latter's right to interest for delay in payment of their specific pecuniary legacies. At the time of the rendition of the executor's first account, there were sufficient assets in the estate to pay the legacies, executor's commissions, counsel fees, and all claims against the estate, including tax claims, with a substantial amount left over for the residuary legatees. The delay was sought to be excused by the executor because of his unwillingness to pay any bequest until ascertainment of the amount of the tax due from the estate. The executor's efforts to expedite a tax ruling did not include prompt statutory written application, which application would not have been disadvantageous to the estate.

A decree ordering payment of interest to the legatees out of the residuary estate was reversed by the Court of Appeals of Maryland, in an opinion by Justice Delaplaine, which held that interest was recoverable from the due date of the first account, but that such interest was chargeable to the executor personally, and not to the residuary estate.

The "Personal liability of executor

or administrator for interest on legacies or distributive shares where payment is delayed" is discussed in the extensive appended annotation in 18 ALR2d 1384.

Federal Courts — *stockholders' action in.* In a Federal district court sitting in New York the plaintiff in Lavin v. Lavin, 182 F2d 870, 18 ALR 2d 1017, as a stockholder of a New York corporation, brought a derivative suit against the corporation and directors and officers thereof, residents of Connecticut, who were served with process in New York.

In an opinion by Chief Judge L. Hand, the Second Circuit held that the district court had no jurisdiction of the action because the plaintiff and the defendant corporation were both citizens of the same state and hence the requisite diversity of citizenship did not exist, even though the individual defendants were residents of other states. It was pointed out that the provisions in §§ 1401 and 1695 of the Revised Title 28 of the United States Code (formerly § 51 of the Judicial Code) did not bring about a change of the rule as it existed prior to their original enactment.

"Diversity of citizenship as ground of jurisdiction of Federal courts in stockholders' derivative action against directors where corporation is a citizen of same state as plaintiffs, under 28

"These are divorce papers . . . your wife is suing you for desertion."

USC § 1401" is the subject of the appended annotation in 18 ALR2d 1022.

Fire — *liability for spread.* The defendant in Menth v. Breeze Corporation, Inc., 4 NJ 428, 73 A2d 183, 18 ALR2d 1071, used an open shed on leased premises for storage of a considerable quantity of burlap bags containing highly inflammable materials. From unknown causes a fire, accompanied by an explosion, originated in the shed and spread rapidly to a frame apartment house on an adjoining lot, in which the plaintiffs resided. In their suit for damages the trial court, at the close of the plaintiffs' evidence, dismissed the complaint on the ground that the evidence failed to establish negligence on part of the defendant.

In an opinion by Justice Ackerson, the Supreme Court of New Jersey held that the case should have been submitted to the jury, taking the view that, although the doctrine of res ipsa loquitur was not applicable because the fire might have resulted from the act of strangers over whom the defendant had no control, the plaintiffs, nevertheless, had made out a prima facie case.

The appended annotation in 18 ALR2d 1081, supplementing earlier annotations on the point, is entitled "Liability of one on whose property accidental fire originates for damages from spread thereof."

Foreign Alimony Decree — *enforcement of.* In Sackler v. Sackler, — Fla —, 47 So2d 292, 18 ALR2d 856, a wife obtained in a New York court a decree awarding her a weekly sum for herself and for the children's support and subsequently a judgment for past-due and unpaid instalments.

As regards the enforcement of her rights under the decree against her husband in equity proceedings in Florida, the Supreme Court of that state, in an opinion by Justice Roberts, held that (1) the past-due and unpaid instalments which had been reduced to judgment in New York could be enforced in Florida by the same equitable remedies, including contempt proceedings, as are applicable to the enforcement of a local decree; and (2) the New York decree, as to future instalments, might be established and enforced as a local decree, except that the local court was not authorized to enter a judgment as to those past-due instalments which were subject to modification by the New York court, had not been reduced to judgment in New York, and had accrued prior to the establishment of the New York decree as a local decree.

"Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings" is the subject of the appended annotation in 18 ALR2d 862. It supplements an earlier annotation on the point.

Foreign Corporations — *doing business.* In Steinway v. Majestic Amusement Co., 179 F2d 681, 18 ALR 2d 179, an action by a minority stockholder in a domestic corporation

against several foreign corporations, it was alleged that the defendants acquired the controlling stock in the domestic corporation pursuant to a conspiracy to dominate the latter corporation, and that the defendants transferred the stock to one of their number. A decree was sought declaring the acquisition of the stock illegal and restraining the defendants from voting the stock. The Federal district court quashed the purported service of summons on the transferee corporation and dismissed the cause for improper venue, on the ground that this foreign corporation was not doing business within the meaning of a state statute authorizing service upon the secretary of state against a foreign corporation "engaging in or transacting business" within the state without maintaining a process agent. The only activity of this foreign corporation in the state was the holding of the stock and voting it by proxy on two occasions, thus electing a new board of directors.

The Tenth Circuit, in an opinion by Circuit Judge Murrah, affirmed the orders of the court below, holding that the activity in question did not amount to "engaging in or transacting business within the state," for the purpose of service of process. Section 1655 of 28 USC was held not to apply. It was further held that since the transferee corporation was an indispensable party defendant, the dismissal of the action as to it required its dismissal as to all defendants.

The appended annotation in 18 ALR2d 187, entitled "Ownership or control by foreign corporation of stock of other corporation as constituting doing business within state," supersedes an earlier annotation on this point.

Funeral Expenses — *life beneficiary or life tenant.* A testator devised his residuary estate in trust to pay the income and also, in the trustee's discretion, so much of the principal fund as in its opinion was necessary for the care and maintenance, including medical and hospital treatment, of his aunt, his nearest relative mentioned in the will, for and during her natural life, the remainder to be paid to an incorporated charity, which had no relationship to the testator. The aunt had no estate of her own. After her death it was claimed that her funeral expenses were payable out of trust funds, and also that her living expenses up to the time of her death should be so paid. As to the latter claim the remainderman objected, primarily on the ground that under another clause of the will the beneficiary had received income from a life interest in real estate.

In an opinion by Presiding Justice Rhodes, the Superior Court of Pennsylvania held in Re Swinson's Estate, 167 Pa Super 293, 74 A2d 485, 18 ALR2d 1231, that reasonable funeral expenses were payable out of trust funds in accordance with the testator's intention; and also that the trustee could be compelled to pay a reasonable amount for the beneficiary's support.

The appended annotation in 18

ALR2d 1236 collects and discusses the cases passing upon the propriety of paying funeral expenses of an equitable life beneficiary or legal life tenant out of the trust corpus or legal remainder estate.

Gas, Oil, or Mineral Lease — *rights in royalties.* Exceptions to a partial account of testamentary trustees allotting certain funds to the corpus were filed in Re Bruner's Will, 363 Pa 552, 70 A2d 222, 18 ALR2d 92, by a tenant-beneficiary entitled to a portion of the net income of the trust. The funds involved were derived from a "lease" of an interest in oil, gas, and other minerals in a certain tract of land, and the assignment of an oil and gas lease of another tract. The "lease" contemplated a removal of all the oil, with payments to be made as the minerals were removed. The trust instrument authorized a sale, but not a lease or operation of the business. The wells had not been opened during the lifetime of the testator.

A decree dismissing the exceptions to the account was affirmed by the Supreme Court of Pennsylvania, in an opinion by Justice Drew, which held that a power to lease may not be inferred from authority to sell, that a lease contemplating removal of all the oil was in effect a sale, and that, in the absence of authority to lease or operate wells not drilled during the lifetime of the testator, the royalties and bonus, as well as the cash payment, were properly allotted to corpus, rather than to income.

The extensive appended annotation in 18 ALR2d 98 discusses "Rights of tenant for life or for years and remaindermen inter se in royalties or rents under oil, gas, coal, or other mineral lease."

Hotels and Innkeepers — *liability to guest.* The plaintiff in Lonnecker v. Borris, 360 Mo 529, 229 SW2d 524, 18 ALR2d 968, as a guest in a hotel owned and operated by the defendants, was injured when a wire protruding from the bottom of a chair in her room pierced her shoe and she fell while moving the chair. It appears that the plaintiff had complained to the manager of the hotel that the chair needed some repairs and was out of kilter, but not as to the specific condition which allegedly caused her fall.

The trial court first directed a verdict for the defendants but thereafter granted the plaintiff's motion for a new trial.

In an opinion by Commissioner Barrett, the Supreme Court of Missouri affirmed the action of the trial court on the ground that under the circumstances stated above it was proper to submit to the jury the questions as to the defendants' negligence and the plaintiff's contributory negligence.

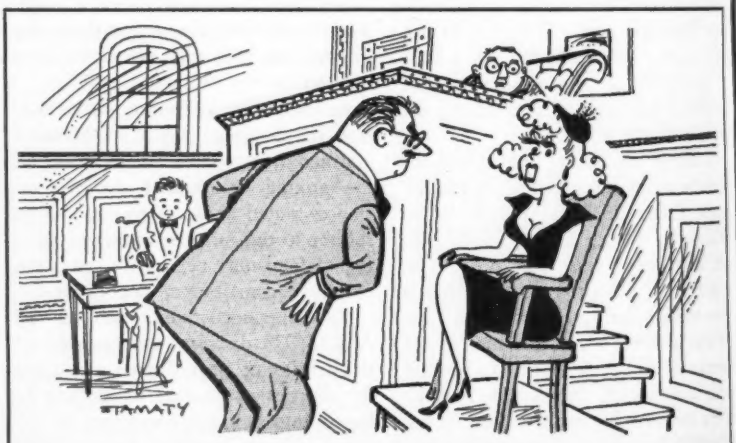
The appended annotation in 18 ALR2d 973 discusses the question of the liability of an innkeeper to a guest for injuries occasioned by defects in furnishings or other conditions in the room or suite occupied by the guest as well as a bathroom if such is attached to such room or suite.

Labor Agreement — *employee's right to enforce.* Actions for damages for breach of a collective bargaining contract were brought in MacKay v. Loew's, Inc., 182 F2d 170, 18 ALR2d 348, by certain members of the union who were discharged by the defendant employer and replaced with nonmembers. The collective agreement provided for a closed shop but did not limit the employer's right to discharge union employees.

Judgments dismissing the complaints were affirmed by the Ninth Circuit, in an opinion by Circuit Judge Orr, which, applying California law, held that a union member-employee could, as a third party beneficiary, sue directly on those provisions of a collective bargaining agreement which were made for his benefit, but that the closed shop clause was not for the benefit of individual employees who could, consistently with the terms of the contract, be replaced by other union members.

The appended annotation in 18 ALR2d 352 discusses "Right of individual employee to enforce collective labor agreement against employer."

Landlord and Tenant — *keeping of pets.* Weaver Brothers v. Newlin (Mun Ct App Dist Col) 74 A2d 65, 18 ALR2d 877, involved a situation in which a tenant kept a dog in his apartment without first obtaining his landlord's written consent as required by the lease. More than three years after



"Now where could I carry a concealed weapon?"

the dog had been obtained by the tenant, the landlord made objections and sued to recover the possession of the premises on the ground that the tenant had breached the lease.

In an opinion by Associate Justice Hood, the Municipal Court of Appeals for the District of Columbia held that there was no breach of the lease when the landlord first made objection, since it had, by its inaction, impliedly given consent to the keeping of the dog and thereby waived the provision of the lease requiring its written consent.

The appended annotation in 18 ALR2d 880 discusses "Relative rights and liabilities as between landlord and tenant with respect to keeping of dogs, birds, or other pets."

Lessee's Covenant to Insure — *as running with land.* A lease contained a covenant requiring the tenant to carry fire insurance in a specified amount to indemnify the lessor against loss by fire, but no provision requiring the insurance proceeds to be used to restore the damage. The lease also contained a covenant requiring the tenant to maintain, keep, and leave the premises in good repair. The tenant assigned the lease to the defendant, who did not assume the obligations arising from these covenants. Thereafter the leased premises were damaged by fire. The premises were not insured, and the lessor brought this action against the assignee to recover his damages.

In an opinion by Justice Spratley, the Supreme Court of Appeals of Virginia denied relief in Burton v. Chesapeake Box & Lumber Corp., 190 Va 755, 57 SE2d 904, 18 ALR2d 1044, on the grounds that the covenant to insure did not run with the land and that the covenant to repair did not bind the tenant or his assignee for fire damage.

The appended annotation in 18 ALR2d 1051 collates the cases in which the courts have had occasion to consider the question whether a covenant by a lessee to carry insurance on the leased premises is merely personal, so as to be binding only as between the immediate parties to the lease, or whether it runs with the land, so as to be enforceable against an assignee of the lease or by a transferee of the premises.

Liability Insurance — *notice, suit papers.* The holder of an automobile insurance liability policy was sued in State Farm Mutual Automobile Insurance Co. v. Cassinelli, — Nev —, 216 P2d 606, 18 ALR2d 431, for damages arising from an accident involving his son's automobile in which he was riding as a passenger at that time, the automobile being used by both in a business mission. Almost four months after the insured had been served with process, he notified and forwarded the suit papers to the insurer. The coverage of the policy included insurance with respect to the presence of the insured in any private passenger automobile other than the one described in the policy. It also required that written notice of an accident be given as soon as practicable and that suit pa-

pers should be forwarded immediately, and provided that no action should lie against the insurer unless, as a condition precedent thereto, the insured had fully complied with all terms of the policy.

In the insured's action against the insurer for indemnification under the policy the latter denied liability on the grounds that the loss was not covered by its terms, and that the insured was precluded from recovery by reason of his failure seasonably to give notice.

In an opinion by Justice Badt, the the Supreme Court of Nevada held that the risk was within the coverage of the clause in the policy as to the insured's presence in another car, but that the insured had not forwarded the suit papers within a reasonable time, the delay not being excused by the fact that he thought that his policy had lapsed and that he was insured in another company, and that, irrespective of prejudice to the insurer, he was precluded from recovery by the express clause of the policy which made compliance with its terms a condition precedent to an action against the insurer.

The appended annotation in 18 ALR2d 443, entitled "Liability insurance: clause with respect to notice of accident or claim, etc., or with respect to forwarding suit papers," supplements and brings up to date earlier annotations on this point.

Loyalty Oath — *governmental requirement for.* New Jersey statutes imposed an oath that the affiant does not believe in or advocate the overthrow of the government by unlawful means and that he is not a member of any organization or group which advocates such an overthrow, upon every person required by law to give assurance of fidelity to the state government, and, specifically, upon the governor of the state, every public officer or employee, and all candidates for nomination or election to any public office or party position, it being also provided that should any candidate fail to file the oath, his nomination or election should be void, and upon every candidate for public office to be voted on at the general election in 1949, it being also provided that, in the event of his failure to take the oath, a legend on the ballot should state his refusal. On the other hand, the state constitution provided that every member of the legislature and every state officer should take an oath to support the Federal and state Constitutions.

In Imbrie v. Marsh, 3 NJ 578, 71 A 2d 352, 18 ALR2d 241, the nominees of the Progressive Party for governor and members of the state legislature challenged the validity of the statutes in a suit for injunctive and declaratory relief.

In an opinion by Chief Justice Vanderbilt, the Supreme Court of New Jersey held that the constitutional oath was exclusive as to the members of the legislature and state officers, and that consequently the statutes stated above were invalid as beyond the power of the legislature.

The extensive appended annotation

in 18 ALR2d 268 undertakes a review and analysis of the judicial rulings upon the validity of governmental requirements of oaths of allegiance or loyalty, however ordained and of whomever required. It is designed to cover the case law upon the question: What, under our constitutions, may the Federal or state governments require of persons in the way of oaths of allegiance or loyalty?

Malicious Prosecution — *employer's liability for acts of employee.* At the instance of an attachment creditor of the plaintiff a constable levied an attachment in Manuel v. Cassada, 190 Va 906, 59 SE2d 47, 18 ALR2d 395, on plaintiff's car while it was in the defendants' garage. The attachment was void because of the creditor's failure to give a bond, as required by statute. After the plaintiff had surreptitiously removed the car from the garage, the night manager in charge, erroneously advised by the constable that the garage owners were liable for the car, caused the plaintiff's arrest on a charge of larceny. The owners had no previous knowledge of the manager's action; the owner in charge of the business had not even subsequent knowledge thereof, until shortly before a hearing in court where he appeared solely for the purpose of having the warrant for plaintiff's arrest dismissed. The plaintiff sued the owners to recover damages for malicious prosecution.

In an opinion by Justice Eggleston, the Supreme Court of Appeals of Virginia held that the owners were not so liable, since the manager had not been acting within the scope of his employment and they had never ratified his acts.

The subject of the appended annotation in 18 ALR2d 402 is "Acts of employee, in procuring warrant or aiding prosecution, as within scope of employment so as to render employer liable for malicious prosecution."

Oil-Burning Heater — *servicing, repairing, adjusting.* In Esso Standard Oil Co. v. Stewart, 190 Va 949, 59 SE 2d 67, 18 ALR2d 1319, an action for damage to the furniture, walls, and interior of plaintiffs' house by an excessive accumulation of smoke from a hot-water oil furnace allegedly occasioned by the negligence of the defendant's employees in repairing it, the employees' uncontradicted testimony was that they made adjustments only on the thermostat, but not on the air shutter, and it was also shown that the objectionable condition could have been caused only by a defect in the air shutter, but not by one in the thermostat. Moreover, experts testified that if the shutter had been improperly adjusted, the smoke would have been noticeable within a half hour, whereas the plaintiffs admitted that no smoke was noticeable until the next day. On the other hand, the plaintiffs showed that no one touched any part of the furnace after the employees had left until after the damage occurred. The trial court rendered a judgment on a verdict for the plaintiffs.

In an opinion by Justice Miller, the Supreme Court of Appeals of Virginia held that the evidence described above failed to establish a causal connection between the activities of defendant's employees and the smoking of the oil furnace. Hence final judgment was entered for defendant.

"Liability of one servicing, repairing, or adjusting an oil-burning furnace or other oil-burning heating appliance, for personal injury, death, or property damage" is the subject of the appended annotation in 18 ALR2d 1326.

Perpetuities — *gift in remainder to great-grandchildren.* Snyder's Estate v. Denit, — Md —, 72 A2d 757, 18 ALR 2d 663, involved a will which, after providing for successive life estates for the testator's children and grandchildren, made gifts of the remainders to his great-grandchildren, referring to each grandchild by using the word "she." At the time of the execution of the will as well as at the time of his death, the testator had two living children, a son, fifty-three years old, and a daughter, fifty-eight years old, and three grandchildren, all of whom were granddaughters.

After the death of one of the grandchildren the validity of the gift to the great-grandchildren was challenged on the ground that the gift to the grand-

"I solemnly swear to tell the truth, the whole truth, and nothing but the truth, cross my heart and hope to die, or cut me in little pieces and feed me to puppy dogs!"

children was a gift to a class not closed at the testator's death, and that consequently the gift to the great-grandchildren violated the rule against perpetuities.

In an opinion by Chief Justice Marbury, the Court of Appeals of Maryland sustained the gift to the great-grandchildren as valid upon a finding that, in view of the circumstances set forth above and under settled rules of construction, the gift to the grandchildren was to individual grandchildren living and known to the testator, and not a class gift.

"Validity, under rule against perpetuities, of gift in remainder to creator's great-grandchildren, following successive life estates to children and grandchildren" is the subject of the appended annotation in 18 ALR2d 671.

Public Officer's Bond — *limitations, action on.* A former county court commissioner and the surety on his official bond were sued in State ex rel. Alderson v. Holbert, — W Va —, 58 SE2d 796, 18 ALR2d 1170, for the recovery of excess payments of salary. The action was commenced after expiration of the period of limitations applicable to an action for breach of official duty, but before expiration of the ten-year period specifically provided by statute for maintenance of an action upon a bond of a public officer.

A rule overruling plaintiff's demurrers to pleas of the statute of limitations was reversed by the Supreme Court of Appeals of West Virginia, in an opinion by Justice Given, which held that the action was one upon the bond of a public officer within the meaning of the specific provision of the statute of limitations applicable thereto.

Lovins, P., dissenting in part, regarded the action as one, not upon the bond, but for a breach of official duty imposed by statute, for the performance of which the bond was merely collateral security, so as to be barred by expiration of the shorter period of limitations.

The extensive appended annotation in 18 ALR2d 1176 discusses "What period of limitation governs in an action against a public officer and the surety on his official bond."

Public Utilities — *refunds to patrons.* In Straube v. Bowling Green Gas Co., 360 Mo 132, 227 SW2d 666, 18 ALR2d 1335, customers of a natural gas company who had paid the rates fixed by the Public Service Commission claimed a pro rata share in two funds: One received by the gas company from the registry of a Federal court upon the affirmance of an order by the Federal Power Commission reducing the rates payable by the company to a supplying utility, and the other being the alleged excess amount collected by the gas company after the reduction order was in effect and before a new rate had been established with respect to its own customers. The trial court dismissed the petition for lack of jurisdiction.

In an opinion by Justice Dalton, the Supreme Court of Missouri held that

the court below had jurisdiction to determine the controversy, but that the plaintiffs were not entitled to relief on the theory of unjust enrichment, since the gas company was entitled to the rates fixed by the Public Service Commission.

The "Right of customers of public utility with respect to fund representing a refund from another supplying utility upon reduction of latter's rates" is discussed in the appended annotation in 18 ALR2d 1343.

Self-Crimination — *wearing or trying on clothes.* In Barrett v. State, 190 Tenn 366, 229 SW2d 516, 18 ALR2d 789, the proprietor and an employee of a beer parlor were robbed by a man who attempted to disguise himself. In the prosecution for the robbery, in addition to identifying evidence based on the size, voice, and eyes of the accused, a helper on a beer truck positively identified the accused as the man he had seen in an outhouse shortly before the robbery, describing his hat and clothes. The arresting officer had the accused wear a hat in jail while this latter witness observed him. It was held by the Tennessee Supreme Court that this act of the arresting officer, not occurring in the presence of the jury, did not violate the constitutional rights of the accused by compelling him to give evidence against himself. The opinion was written by Chief Justice Neil.

The appended annotation in 18 ALR2d 796 discusses "Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights."

Service of Process — *on representative of deceased nonresident driver.* A New York statute involved in Leighton v. Roper, 300 NY 434, 91 NE2d 876, 18 ALR2d 537, provided that a nonresident motorist involved in an accident in the state should be deemed to have consented that the appointment of the secretary of state as attorney for the receipt of process pursuant to other provisions of the statute should be "irrevocable and binding upon his executor or administrator." In accordance with this provision summons and complaint in an action for damages arising from an automobile collision in New York was served upon the foreign administrator of a nonresident motorist who had died as the result of the accident.

In an opinion by Justice Froessel, the Court of Appeals of New York, refusing to vacate the service, held that the statute was a valid exercise of police power and was not in conflict with due process.

The appended annotation in 18 ALR2d 544 discusses "Constitutionality and construction of statute authorizing constructive or substituted service of process on, and continuation of pending action against, foreign representative of deceased nonresident driver of motor vehicle, arising out of accident occurring in state."

Shock or Mental Suffering — *from witnessing injury.* The defendant

in Cote v. Litawa, — NH —, 71 A2d 792, 18 ALR2d 216, having injured a child by his negligent operation of his automobile, carried her upstairs to her pregnant mother. Following the accident the mother had heard a commotion outside and had heard someone call out the child's name. To recover damages for the shock and fright, with ensuing physical consequences, the mother instituted this action, and her husband sought to recover for the loss of consortium of his wife resulting therefrom.

The opinion of Justice Lampron of the New Hampshire Supreme Court held there could be no recovery, such consequences being such an unusual and extraordinary result of the careless operation of an automobile that to impose liability therefor would place an unreasonable burden upon users of highways.

The subject of the appended annotation in 18 ALR2d 220 is the right of a plaintiff, in an action for negligence, to recover damages for nervous shock or mental suffering caused by apprehension of injury to another, or by the witnessing of such injury—either by seeing it happen or by seeing the resulting physical condition afterward.

Trusts — *revocation or modification by will.* A trust inter vivos which was involved in Leahy v. Old Colony Trust Co., — Mass —, 93 NE2d 238, 18 ALR2d 1006, provided that the income was payable to the settlor for life, and that at her death the princi-

"I think it was smart of him to get his attorney to present the proposal."

Were The Pilgrims Communists?

During their first two years in America the Pilgrims were deluded by their London bosses into trying a system of communal living.

It wasn't the Russian brand, of course — that hadn't been dreamed of. But there was no private ownership of land. No reward for the industrious.

Everything was everybody's — and at the same time, nobody's.

And what happened? Well — the hard working and capable were imposed upon by the idle and inefficient.

There were complaints and counter-complaints, bitterness, indolence, and finally open revolt.

And so, in the third year, it was decided to try another system. Each man was assigned his own piece of land and allowed to enjoy the fruits of his own labor.

The bountiful harvest that year was the start of a more abundant life for the Pilgrims, based on free enterprise and individual initiative.

Today, when millions of human beings in other countries have lost or forsaken these privileges, we at Shepard's salute the Pilgrims for teaching America more than three hundred years ago that the other way just won't work.

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pal, after various payments to designated persons, should be paid to a beneficiary. The settlor reserved the powers to amend or revoke the trust during her lifetime, to withdraw principal, and to control investments. She attempted to revoke the trust by her will.

In an opinion by Justice Lummus, the Supreme Judicial Court of Massachusetts held that the trust was not invalid as a testamentary trust not executed as required for wills, and that it could not be revoked by will, since a will does not take effect during the testator's lifetime.

The appended annotation in 18 ALR2d 1010 collects the cases in which a trustor has reserved a power in the trust instrument to change or revoke the trust, and the question is whether he has effectively exercised that power by provisions in his will.

Wills — *after-acquired interests.* Smith v. Wheeler, — Mass —, 93 NE2d 544, 18 ALR2d 516, involved a will which gave to named legatees one-half interest in a business owned by the testator in common with a third person. Subsequently the testator acquired the entire interest in the business. Upon his death the legatees claimed the after-acquired interest.

In an opinion by Justice Williams, the Supreme Judicial Court of Massachusetts held that the bequest was a specific legacy and did not include the testator's after-acquired interest in the business, which passed to the residuary legatee.

The appended annotation in 1[illegible] ALR2d 519, entitled "Enlarged interest acquired by testator after execution of will as passing by devise or bequest," supersedes earlier annotations on this point.

Wills — *drawn by laymen.* [illegible] Petersen, 230 Minn 478, 42 NW2d 59, 18 ALR2d 910, involved a will which, although the testator had had sufficient time to have had it prepared by a licensed attorney at law, had been drafted by a layman, in violation of a statute which prohibited and penalized the act of an unlicensed practitioner in preparing a will for another. In probate proceedings the testator's heirs at law, for whom no provision was made in the will, contended that the will was invalid, because in violation of the statute.

In an opinion by Justice Matson, the Supreme Court of Minnesota upheld the will as valid, primarily on the ground that the statute was intended to protect testators from individuals who, without adequate legal training, offered their services, and was not intended to invalidate wills made by victims of the offenders.

The appended annotation in 18 ALR2d 918 discusses "Validity of will drawn by layman who, in so doing, violated criminal statute forbidding such activities by one other than licensed attorneys."

Wills — *revocation by divorce or annulment.* The Arkansas Supreme Court, in an opinion by Justice George

ose Smith, held in Mosely v. Mosely, Ark —, 231 SW2d 99, 18 ALR2d 95, that a will in favor of a wife is not revoked by a subsequent divorce, where a statute enumerates the methods of revocation without mentioning divorce and contains no provision that does not affect the revocation implied by law from subsequent changes in the condition or circumstances of the testator.

The appended annotation in 18 ALR2d 697, entitled "Divorce or annulment as affecting will previously executed by husband or wife," supersedes a series of earlier annotations on this question.

Zoning — *resumption of nonconforming use.* A commercial business was conducted upon property in a residential district on the effective date of a zoning code which permitted the continuance of nonconforming use then existing, but prohibited its resumption after discontinuance. After the outbreak of war there was a cessation of the business, due to the owner's absence for eighteen months of military service and to wartime regulations which made it impossible for her to use her trucks in carrying on the business.

In an opinion by Justice Grady, the Supreme Court of Washington held in King County v. High, — Wash2d —, 219 P2d 118, 18 ALR2d 722, that cessation of the business under the circumstances stated above was not a discontinuance of nonconforming use within the meaning of the code which would preclude its resumption.

The appended annotation in 18 ALR2d 725, entitled "Right to resume nonconforming use after period of nonuse or of a different use from that in effect at or before the time of zoning," supersedes an earlier annotation on the point.

Legal Fees—A New Aspect

Some time ago I closed an estate in which the heirs agreed to sell a 20-acre tract of land to one of the heirs for the sum of $2,000.00, and requested that I draft the necessary deed. After all of them had signed the deed and the purchaser had paid for the land, they chipped in and paid me my $10.00 fee. The buyer walked out with her deed and seemed very happy. You will imagine my surprise when a few days later she returned to my office with an apprehensive gleam in her eye, and confronted me with the deed and the statement, "Didn't you get paid in full for transferring this land to me?" I assured her that my services had been fully paid, and then she countered: "At the bottom of this deed it says 'My commission expires May 17, 1956.' Does this mean that you intend to collect a commission off of the crops from my land until that date?" This so startled me that I spent fifteen minutes giving her a thorough course in Notaries Public, their appointments, terms and powers, and it was not until the full course had been completed that her fears were fully calmed.—Contributed by Herbert F. Mayer, of the Grand Island, Nebraska, Bar.

Duties in Filing Decedent's Returns

by KNOX FARRAND *of the Los Angeles Bar*

●

Condensed from Trusts and Estates*

SINCE death seldom coincides with the end of a tax reporting period, and since no return can in general include a period of over twelve months, more than one return is normally involved in the case of a decedent. Thus, if not already filed by decedent in his lifetime, a return is required for the last complete taxable year ending before decedent's death, and another return is required for the fractional part of a year ending with the taxpayer's death.

In the usual case of a decedent who reported income on a calendar year basis, the return for the last full calendar year is due on or before March 15 following the close of such calendar year; and in the case of a fiscal year taxpayer, on or before the 15th day of the third month following the close of such fiscal year. The final return for a decedent covering the fractional part of a year ending with his death, if such period ends in 1949 or thereafter, is likewise due on or before the 15th day of the third month following the close of the twelve month period which began with the first day of such fractional part of the year.

Joint Returns

Since enactment of the Revenue Act of 1948, a joint return may be filed despite the death of one, or even both of the spouses during the taxable year. The right to file such a joint return, however, is conditioned upon the surviving spouse not remarrying before the close of his taxable year.

The joint return must normally be filed by the executor or administrator of the deceased spouse, but under some conditions it may be filed by the surviving spouse for both himself and the decedent. The right of the surviving spouse to file a joint return under these circumstances is subject to certain limitations which are spelled out in some detail in the Regulations.

In cases where the surviving spouse has filed a joint return and an executor or administrator is thereafter appointed the statute authorizes the executor or administrator to disaffirm the joint return by filing a separate return for

* This article was originally delivered at the Title Insurance and Trust Company 1950 Tax Panel, Los Angeles, Cal. The condensation here used is reprinted from The Monthly Digest of Tax Articles, August, 1951.

the decedent. Such a separate return must be filed within one year after the last day prescribed for filing the return of the surviving spouse. It will be evident that an executor or administrator may be confronted with the necessity of a nice balancing of numerous factors when deciding whether to file a joint return or whether to disaffirm one already filed by the surviving spouse.

No declaration of estimated tax need be filed after the death of a taxpayer, nor are any payments of estimated tax required. Any notice of installment of estimated tax due subsequent to the date of death should be returned to the Collector with a statement of the date of death of the taxpayer.

A joint declaration may not be made after the death of either the husband or the wife. However, special provision is made in the regulations regarding liability of the surviving spouse for payment of subsequent installments of the joint estimated tax and regarding division of payment thereby agreement between the surviving spouse and the legal representative of the decedent.

Returns for Estate

Income taxes imposed upon individuals are made applicable to the

"I want to sue my other lawyer for not getting me the kind of divorce settlement I asked for."

me of estates, are computed upon e net income of the estate and, in eneral, are payable by the fiduciary. he Code imposes upon every fiduciary e duty of making a return for any tate for which he acts having a gross come for the taxable year of $600 over.

In case two or more fiduciaries act intly, at least one must make the turn. When any beneficiary of the tate is a nonresident alien, a return required without regard to the nount of the gross income.

The Regulations require the first turn under some circumstances to be companied by a sworn copy of the ill of the decedent. Generally the lace for filing the return is with the ollector for the district in which is cated the legal residence or prinipal place of business of the person aking the return.

The determination of the time for ling income tax returns for an estate linked to the selection of a tax reorting period for the estate. Inasmuch the decedent and his estate are separate taxable entities, the estate is not bound by the decedent's selection of a reporting basis, and the first return filed by the fiduciary may be filed either on a calendar year basis or on a fiscal year basis.

However, once one basis or the other has been chosen, it may not thereafter be changed without the permission of the Commissioner. The time for filing the return is on or before the close of the calendar year, or on or before the 15th day of the fourth month following the close of the fiscal year, as the case may be.

Upon completion of the administration of the estate, the executor or administrator may immediately file the final return of income of the estate for the taxable year in which the administration is closed, or the filing may be deferred until the due date mentioned above. Ordinarily, returns should be filed as soon as practicable after settlement of the final account in order to expedite final examination and determination of the estate's tax liability.

Legal Desertion

Mr. Justice Cuff of the Supreme Court, Queens County, on a motion to dismiss a complaint for insufficiency where the defendant failed to appear and to submit any opposition, made the following remark:

"No matter how good or how bad it may be, a complaint should never be deserted by its author under these circumstances, thereby trusting its fate to the hostile hands of the opposition and the neutral mind of the court. It deserves an escort, as it wends its way through the judicial grist, commonly known in the art as a memorandum of law. Vulnerability, perhaps not justified, is suggested by its lonely predicament." Meredith et al vs Beechhurst Building Corporation, et al, 83 N. Y. Supp. 2d 338.

Contributor: Attorney Arthur B. Ewig
Kingston, New York.

What Is to Be Left of Your Law Practice in 1975?

By BENJAMIN LEADER
of the Birmingham, Alabama Bar

Condensed from The Alabama Lawyer, July, 1951

IT behooves the lawyer to face the problem of what is to be left of his law practice in 1975 and recognize the gravity of the situation. Are we going to wipe the cobwebs from our eyes and meet the challenge as other progressive groups have done? Or, are we to continue as we have in the past, hide our heads in the sand and await the passing of the storm? Are we going to take an honest inventory of our present ability to serve and the value of these services to our clients?

Are we mindful of the fact that as the railroad first, and then the automobile outgrew the oxcart and the messenger on horseback, so the "innovations" available to our clients have outgrown the antiquated methods of law practice, and that we lawyers are feeling the effect of this impact? This may not yet be true insofar as it pertains to the large metropolitan law firms who have specialists manning each department, but as to the rank and file of lawyers it is true.

The lawyer was once the envy of the professions. He made abstracts, handled estates, arbitrated disputes, tried cases in court, acted as counsellor and advisor on all matters business and personal, was esteemed by the public and feared no encroachment.

The lawyer has failed to keep the public advised of his ability to serve them and the many good qualities he possesses and his contribution to the public welfare.

What do we find today? The title work of the lawyer is gradually vanishing. It won't be many years before an abstract will be considered an antique. The large lenders who require title policies have educated millions to become familiar with them, and the lawyer has materially assisted in helping to accomplish this.

I have no quarrel with title companies. They are necessary. They have specialists in making abstracts and the lawyer must have these to do title work in large centers. We must do everything in our power to see that abstracts will always be available and we can do this by sustaining more than one title company in a community. One may benefit under certain circumstances by accepting title policies, but not always. There are times when you would prefer the lawyer of your own choosing to pass on your title, and when a title company com-

stantly says to the public that their title policy is all one needs, then if you can't iron out your differences amicably, maybe it would not be out of place for the lawyer to tell the public of his own value in that respect and why a lawyer of his own choosing may be the best.

In the past lawyers administered estates. To a great extent they are now being handled by trust companies. These trust companies usually employ lawyers and in the past some were prone to write wills without charge and likewise advise on estate matters. I am glad to say that so far as Birmingham is concerned, an amicable arrangement was worked out several years ago between lawyers and trust companies, and we find a need for both. The trust companies respect the rights of the lawyer and ask their appointment as attorneys for the executor and trustee. But to accomplish this friendly relationship required effort on both sides and undaunted vigilance from both to maintain it.

We have public relations and labor specialists. They either work for one employer, or serve many. Some have clients all over the country.

We also have the adjuster. He likewise is employed by one or many employers. He settles disputes, which may be damage suits, fire losses, or other kinds of insurance. He travels from place to place, contacts your client, sells him on the idea of employing him or his firm. Sometimes he has the discretion of giving the trial work to lawyers of his own choosing. However, since a great number of these cases are settled before suit, there are very few crumbs left for the lawyer. Again we meet the specialist. There should be and is a place under the sun for both, and a relationship should be worked out fair to both.

We then come to the profession of the accountant. His number has become legion. The Income Tax Departments of both the Federal and the State have taught the large and small businessman that he must have an auditor or accountant. The average auditor or accountant is a likeable person, honest, sensible and usually, of marked ability. There are a few who overstep the boundary. These have formed the habit of passing on nearly every question. They even define contracts, write minutes of corporate meetings, directly or through your clients suggest settlements of disputed matters, settle his ad valorem assessments, pass on his life insurance contracts and last but not least, your client's tax matters —Federal, State, County and City.

Let me repeat that this type of enthusiasm to take over the business world does not apply to all accountants, but, nevertheless, gradually this group to which it does apply has the earmark of absorbing the major portion of legal business matters. They have the edge on you. They are with your clients more often. They are familiar with his needs. They know the weak and the good points of his business. Your client has grown to rely on him

The mere fact that he is not a lawyer means nothing to the average layman. We find some in the group who are not lawyers and make no pretense of doing accounting work, but still handle all sorts of tax matters. This group continues these activities, notwithstanding the fact that the rights of the accountants have been clearly defined in the case of New York County Lawyers Association v. Bernard Bercu, NY Sup Ct 1st Division, 273 App Div 524; 78 NYS 2209; 9 ALR2d 787. The Court held that the services rendered by this accountant in this case were well into the field of law and outside the field of accounting.

Every lawyer and every accountant should study this case to understand fully what the services of each demand, and what is meant by the unlawful practice of law, and make every effort in a friendly way to reach an honest and amicable understanding of the rights of each and stand by it.

The list of those specializing in work formerly done by the lawyer could be extended until it now may be "later than you think." We may finally wind up with a situation where there is very little left for lawyers to do, except engage in trial work, and since many of the Federal and State Bureaus do not require one to be a lawyer to practice before them, we lawyers are gradually losing this work.

Now, is there a remedy for all this? Yes, I think so.

We can create aggressive planning boards in the American, State, County, and City Bar Associations that have for their purpose the elimination of unlawful law practice. Men should be elected as head of Bar Associations who are virgorous, and, above all, willing to devote a sufficient amount of their time towards the functions so needed.

We have recently seen what can be done when the doctors in America virtually killed socialized medicine. We can emulate what the doctors are doing in acquainting the public with our problems through radio programs and other means. Why can't the lawyer tell the public the advantage of the lawyer—the necessity for a lawyer, etc. Why not tell the public that regardless of the specialists, the lawyer is still the person to turn to and that his general education in law can't be matched by one who only knows one subject. Let the Bar Associations employ men to watch the unlawful practice of law and failing to accomplish its elimination by friendly means, start criminal prosecutions.

Run your Bar Association meetings in the same way the medical profession does—do something for the lawyer. He has full knowledge of what he owes the public, but now and then he wants to know what the public owes him and how can he better himself. Don't hold a Bar meeting having for its purpose the reading of papers all day—that is boresome and tiresome; set a day aside and devote it to matters that will financially help the lawyer. Discuss how to run your office on a

systematic basis; how you can increase your fees consistent with value; where you can buy supplies for the least money. Study all matters that would be helpful to the lawyer.

The Bar Association should be provided with the means to really function, and the law firms should supply these means.

I am afraid it will not accomplish very much for us to be angry with those who have taken away considerable of our practice. We must put ourselves in a position of doing a better job or pay the penalty.

It behooves us to put our own house in order. We, the older members of the Bar, may yet find it valuable to learn something of the things necessary to carve out a successful practice and to render our clients the kind of service they demand. We should not look disgusted when it is said that our office needs cleaning up, that our filing system is antiquated, that we are not maintaining the necessary data to judge the reasonableness of a fee, that our desks are piled with so many matters that it is impossible to give them the attention they require, that we are not cooperative in adhering to more modern businesslike requirements affecting our office and our clients, and that last, but not least, we are not improving ourselves in a business way so that we might intelligently advise our clients.

The average young lawyer has had no business experience, he usually receives none in law school, and on entering the law field usually emulates the older lawyer and refuses to run his office in a businesslike way and adhere to rules. He would rather do what the old grocer did who finally wound up in the bankruptcy court—let his customers buy merchandise for six months and then guess at what he ought to charge. I believe he sometimes thinks that modern methods and efficiency will take away the halo from his profession, but not one bit of dignity would be taken away from our honored profession because we became attuned to the times—adopted businesslike methods—insisted on our rights, and let the public know our value.

A lawyer cannot go into a store of his most valued client and acquire a handkerchief without its being paid for. He cannot go into his doctor's office and receive the slightest service without likewise paying for it. Still, lawyers will give their time and advice, even to those from whom they have never received a fee, without charge, and many times without thanks.

Are we lawyers to meet this challenge?

I am not unmindful of the fact that in every trade, business and profession, you will have individuals of varied ability. I am simply writing this to say first, that it requires greater ability in law for equal financial success, and secondly, that it behooves the profession to now stop, look, listen, and, for once, ACT.

only 1 place to look

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